

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARCO ZALDIVAR, et al.,
Plaintiffs,

v.

T-MOBILE USA, INC.,
Defendant.

CASE NO. C07-1695RAJ
ORDER

I. INTRODUCTION

This matter comes before the court on two motions (Dkt. # 53, 54) from Defendant T-Mobile USA, Inc. (“T-Mobile”) and Plaintiffs’ motion for appointment of interim class counsel (Dkt. # 51). For the reasons stated below, the court DENIES both of T-Mobile’s motions and RENOTES Plaintiffs’ motion pending additional submissions from counsel as outlined in this order.

II. BACKGROUND

Plaintiff Marco Zaldivar, a California resident, seeks to represent a class of plaintiffs affected by T-Mobile’s allegedly unfair text message billing practices. Mr. Zaldivar has not yet moved to certify a class, and no motion for certification is due until September 25, 2008. T-Mobile has filed two motions asserting that the court should, in

1 advance of class certification, limit Mr. Zaldivar to representing a class of California
2 residents only.

3 Mr. Zaldivar's counsel, whom the court will call Counsel Group One, seek to be
4 appointed as interim class counsel pending the court's decision on class certification.
5 Counsel Group One has requested interim class counsel status once before. At that time,
6 two class actions targeting the same T-Mobile practices were pending in this district: the
7 instant action (the "Zaldivar litigation"), and another action in which Maria Detweiler, a
8 resident of Florida, was the sole class representative (the "Detweiler litigation," Case No.
9 C07-2090). Another group of lawyers, whom the court will call Counsel Group Two,
10 represented Ms. Detweiler. On May 2, 2008, the court issued an identical order in both
11 litigations. The court held that a choice-of-law clause contained in T-Mobile's consumer
12 contract mandated that the law of each consumer's state of residence would govern
13 disputes arising out of the contract; that under California law, the mandatory arbitration
14 clause and class action waiver contained in the contract were unenforceable; and that
15 under Florida law, the arbitration clause and class action waiver were enforceable. The
16 court stayed the Detweiler litigation pending arbitration, and found it unnecessary to
17 resolve the motion for appointment of interim counsel in light of the disposition of the
18 Detweiler litigation..
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21 Since the May 2 order, Counsel Group Two has filed two more putative class
22 action lawsuits in this district, again targeting the same T-Mobile practices. The first is
23 on behalf of Joseph Calloway, a Washington resident (the "Calloway litigation," Case
24 No. C08-731). The second is on behalf of Shane McNeill and three other putative class
25 representatives, who reside in Tennessee, New Hampshire, Nevada, and New Jersey (the
26 "McNeill litigation," Case No. C08-863). In each litigation, Counsel Group Two
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1 proposes to represent only class members residing in the states where their class
2 representatives reside.

3 III. ANALYSIS

4 A. There is No Basis, at this Stage of the Zaldivar Litigation, to Limit The 5 Putative Plaintiff Class to California Residents.

6 T-Mobile moves the court to limit the putative class in this case to California
7 residents. T-Mobile supports its request with two contentions: that the Ninth Circuit's
8 opinion in *Lozano v. AT&T Wireless Serv., Inc.*, 504 F.3d 718 (9th Cir. 2007) requires the
9 California-only limitation; and that this court's May 2 order supports the limitation as
10 well.

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12 In *Lozano*, a Ninth Circuit panel considered the district court's denial of a motion
13 to certify a nationwide class of mobile phone subscribers. 504 F.3d at 724. The district
14 court, considering a subscriber contract with an arbitration clause and class action waiver
15 much like the one in T-Mobile's contract, determined that state-by-state variations in law
16 governing the arbitrability analysis made class certification inappropriate. *Id.* The
17 plaintiff provided no state-by-state legal analysis in support of its class certification
18 motion. *Id.* at 728. The panel held that the district court was not required to conduct a
19 *sua sponte* state-by-state analysis, and that it had not "abuse[d] its discretion" by refusing
20 to certify a class based on its concerns about variations in the laws of the 50 states. *Id.*

21
22 T-Mobile twists the *Lozano* court's deference to the discretion of the district court
23 into a mandate that district courts refuse to consider nationwide classes of plaintiffs
24 bound by contracts with arbitration clauses. *Lozano* mandates nothing of the sort. It
25 recognizes that a district court *can*, in its discretion, refuse to certify a class where state-
26 by-state variations in law make the plaintiffs' claims unsuitable for class treatment, and it
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1 recognizes that the plaintiff, not the court, bears the burden to establish that state-by-state
2 legal variations can be managed.

3 In this case, Mr. Zaldivar has not yet attempted to address the effect of state-by-
4 state legal variations, but he is not yet required to. T-Mobile has put forth no state-by-
5 state analysis of law for him to rebut. Absent such an analysis, Mr. Zaldivar need not
6 address the issue until he moves for class certification. When he presents his motion for
7 certification, the court expects that he will heed the lessons of *Lozano*. He might also
8 consider this court's decisions addressing the importance of showing that state-by-state
9 legal variations are manageable. *See Estate of Felts v. Genworth Life Ins. Co.*, __ F.R.D.
10 __, 2008 U.S. Dist. LEXIS 40835, at *27-31 (W.D. Wash. Apr. 14, 2008). But neither
11 *Lozano* nor any other authority of which the court is aware precludes Mr. Zaldivar from
12 presenting argument in support of a class with members who reside outside California.
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14 The May 2 order undermines, rather than supports, T-Mobile's position. In that
15 order, the court held that Florida law dictated that the T-Mobile arbitration clause and
16 class action waiver was enforceable against Ms. Detweiler. Although that holding is a
17 substantial obstacle to Floridians whom Mr. Zaldivar might seek to represent¹, it provides
18 no support for the notion that only Californians may participate in this class. The court
19 had no occasion in the May 2 order to consider the law of 47 states. In addition to its
20 discussions of California and Florida law, however, the court noted that binding
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24 ¹The court notes that Counsel Group One, Counsel Group Two, and T-Mobile all take
25 different positions as to the effect of the May 2 order under principles of res judicata, claim
26 preclusion, and law of the case. The court need not address their positions, but makes two
27 observations. First, for the convenience of the court and the parties, the court entered the
28 identical May 2 order in both the Zaldivar and Detweiler litigations. The mere act of entering
the same order in both cases does not alter the preclusive effect of either order. Second, the
court suggests that all parties would be better served by focusing on the practical effect of the
May 2 order, rather than squabbling over questions of res judicata, claim preclusion, and law of
the case that are unlikely to have any impact on the resolution of their disputes.

1 precedent “compel[s] the conclusion that, under Washington law, the Arbitration Clause
2 and Class Action Waiver to which it is linked are substantively unconscionable.” May 2
3 Order at 10-11. For that reason, T-Mobile’s implicit assertion that Washingtonians
4 cannot participate in the class is puzzling, to say the least. As to potential class members
5 residing in the 47 states whose laws the court has not considered, the May 2 order is
6 silent.
7

8 T-Mobile has presented no valid basis for the court to preemptively limit the
9 putative class in this action to California residents. For that reason, the court denies T-
10 Mobile’s motion to strike Mr. Zaldivar’s nationwide class actions. For the same reason,
11 the court denies T-Mobile’s motion for a protective order, which seeks to limit discovery
12 solely to the potential claims of California residents.
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14 Although this order does not resolve Mr. Zaldivar’s motion to compel, which
15 raises a variety of particularized discovery disputes, it does foreclose T-Mobile’s
16 opposition to that motion to the extent it relies on the mistaken view that this action is
17 currently limited to California subscribers. The court directs the parties to meet and
18 confer again, in light of this order, to see if they can resolve the disputes presented in the
19 motion to compel.
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21 **B. Counsel Group One and Counsel Group Two Shall Submit Additional
22 Information to Permit the Court to Appoint Interim Class Counsel.**

23 The court now turns its attention from T-Mobile’s contentions to the dispute
24 between Counsel Group One and Counsel Group Two. In the wake of the McNeill and
25 Calloway litigations, Counsel Group One has renewed its motion to serve as interim class
26 counsel. The court now finds it necessary to appoint interim counsel. This is so for two
27 reasons. The first is that Counsel Group One and Counsel Group Two have been unable
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1 to agree upon a shared role in representing class members. The second reason is that the
2 two counsel groups disagree sharply over who belongs in the proposed class.

3 The court has the discretion, but not the obligation, to appoint interim class
4 counsel in advance of class certification. Fed. R. Civ. P. 23(g)(3) (“The court *may*
5 designate interim counsel to act on behalf of a putative class before determining whether
6 to certify the action as a class action.”) (emphasis added). When more than one counsel
7 group seeks to represent the class, “the court must appoint the applicant best able to
8 represent the interests of the class.” Fed. R. Civ. P. 23(g)(2). In considering applicants,
9 the court “may order potential class counsel to provide information on any subject
10 pertinent to the appointment and to propose terms for attorney’s fees and nontaxable
11 costs.” Fed. R. Civ. P. 23(g)(1)(C).
12

13 The parties have submitted information addressing many of the appointment
14 criteria of Rule 23(g). They have detailed their experience in class action litigation, the
15 qualifications of their attorneys, and the resources of their respective law firms. Based on
16 those submissions, it appears to the court that both counsel groups could adequately
17 represent the class.
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19 In Rule 23(g)’s command to find counsel that best represents “the interest of the
20 class,” the court runs headlong into the differing visions of “the class” that the two
21 counsel groups espouse. According to Counsel Group Two, the May 2 order “all but
22 forecloses the possibility of the plaintiff in *Zaldivar* representing anything more than a
23 California resident state class.” (Dkt. # 62, at 1). Counsel Group Two is wrong, for the
24 reasons stated in Part III.A., *supra*. Nonetheless, Counsel Group Two has chosen, for
25 reasons not apparent from the record, to file three separate litigations in this district.
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27 On the record before the court, it would appear that Counsel Group One seeks to
28 represent a much larger class, one that would encompass the smaller classes proposed in

1 the McNeill and Calloway litigations. In light of this order, both Counsel Group One and
2 Counsel Group Two shall submit a statement addressing which states' class members
3 they intend to represent, and whether they intend to file more class actions asserting the
4 same claims in this district. Counsel shall explain how their respective approaches will
5 best serve the interests of class members.

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7 In addition, both counsel groups shall submit evidence regarding how they will
8 charge the class members they seek to represent as interim counsel. Counsel shall be
9 specific regarding the compensation they intend to seek, and their representations will be
10 binding in the event they ultimately recover on behalf of class members.

11 Before making the submissions required above, the court orders Counsel Group
12 One and Counsel Group Two to meet and confer to discuss the possibility of sharing
13 representation of the class in this matter. If those discussions do not bear fruit, each
14 counsel group shall also explain, in their submissions to the court, why it would not be in
15 the best interests of the class to appoint joint counsel.

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17 In making these submissions, the counsel groups will likely assert that one counsel
18 group would better serve the interests of class members than the other group. This is
19 appropriate. The court reminds both groups, however, that they can assert their superior
20 ability to represent the class without disparaging each other.

21 **IV. CONCLUSION**

22 For the reasons stated above, the court DENIES T-Mobile's motion to strike (Dkt.
23 # 53) and its motion for a protective order (Dkt. # 54). The court RENOTES Mr.
24 Zaldivar's motion for appointment of class counsel (Dkt. # 51) for July 3, 2008.

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26 No later than July 3, 2008, Counsel Group One and Counsel Group Two shall
27 submit statements containing the information the identified in this order. The parties shall
28 file their statements under seal, and may cite this order as the basis for doing so without

1 making the particularized showing that Local Rules W.D. Wash. CR 5(g) requires. The
2 court will unseal the statements after resolving the motion to appoint class counsel.

3 In addition, Counsel Group One and T-Mobile's counsel shall meet and confer to
4 address Mr. Zaldivar's pending motion to compel. Counsel shall, no later than June 27,
5 2008, inform the court of whether they have resolved or narrowed the disputes presented
6 in that motion.
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8 Dated this 19th day of June, 2008.

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11 The Honorable Richard A. Jones
12 United States District Judge
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